Singh had died on a date unknown to the plaintiffs in India" and in paragraph 7 of the Statement of Claim go on to say that "on September 24, 1981 the plaintiffs served on the Honourable Chief Justice of Singapore as legal personal representative of the Estate of Sudagar Singh a Notice to Quit dated September 24, 1981 and expiring on October 31, 1981."

What has primarily to be decided on this plea is whether the plaintiffs had proven the death of Sudagar. On this issue there was no admissible evidence before the trial judge and so it must be that the Notice to Quit served on the Chief Justice is of no effect. And yet again, in the circumstances of this case, at the time of the alleged service of the said Notice to Quit and at the time of the service of the Notice to Quit on the Chief Justice, Sudagar had a clear and unmistakable interest in the said premises and so had to be before the Court before any order adversely affecting him and his interest could be made.

The defendant in his Defence pleads that "the said Sudagar Singh has been a tenant in continuous occupation of the said premises since the year 1942 well before the plaintiffs became the owners and landlords thereof" and "had prior to January 1949 assigned the ground floor and part of the first floor thereof to various successive persons for the purpose of carrying on the business of a barber shop".

The plaintiffs accept the fact that Sudagar has had the tenancy of the premises since 1949 (page 29 of the Record). With regard to the plea by the defendant of successive assignments prior to January 1952 when the plaintiffs purchased the said premises the following documentary evidence in the instant case bears out the plea:

(1) the Assignment dated June 25, 1949 between P. Krishnasamy of the one part and V. Vethyan of the other part (pages 62 and 63 of the Record);

(2) the Assignment dated July 21, 1954 between the said V. Vethyan (therein spelt Vedhayan) of the one part and R. Govindarasu of the other part (pages 67 and 68 of the Record); and

(3) the Assignment dated June 9, 1955 between the said R. Govindarasu of the one part and P. Kothandapani and S. Subramanian of the other (pages 69 and 70 of the Record).

There is the further oral evidence of the defendant himself to the effect that on June 9, 1955 he had bought over the business including goodwill, tenancy, fixtures and furniture.

Lastly I would go on to say that if the said Agreement and the said Notice to Quit had been determined in favour of the plaintiffs and that even if there had been violations of the prohibition to sublet or assign I would still have found against the plaintiffs for it seems clear to me from the evidence that they had been aware of such violations for a long time before they took action.

For all these reasons the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *L.A.J. Smith; Murphy & Dunbar.*

PARKWAY PROPERTIES PTE. LTD. v. PAGE ONE – THE BOOK SHOP PTE. LTD. & 156 ORS.

[O.C.J. (Abdul Wahab Ghows J.) May 21 & June 7, 1985]

[Singapore – Suit No. 3900 of 1985]

Landlord and Tenant – Tenancy agreement – Covenant requiring tenants to keep premises open for business from 10 a.m. to 10 p.m. daily – Breach of covenant by tenants – Interim injunction restraining tenants – Whether enforceable.

Practice and Procedure – Interim injunction – Whether plaintiff/appellant would suffer irreparable damage if injunction not continued – Application of test in American Cyanamid case.

By agreements in writing made on various dates between the appellants and each of the respondents, the appellants leased to the respondents various portions of the premises in the building known as Parkway Parade. By clause 3.20 of the said agreements the respondents had agreed *inter alia* to keep their respective premises open for business from 10 a.m. to 10 p.m. daily or during such hours as the appellants shall from time to time prescribe as the usual business hours of the building. In breach of the aforesaid clause the respondents on or about March 14, 1985 closed their respective premises in consequence of which the appellants claimed that they had suffered loss and damage.

The appellants sought an injunction to restrain the respondents from repeating or doing any act which would directly or indirectly cause a breach of clause 3.20 of the various tenancy agreements made between the appellants and the respondents. On an *ex parte* application of the

appellants, the court granted an interim injunction. Subsequently the appellants applied by way of a notice of motion for the interim injunction to be continued till the trial of the suit or the expiration or termination of the various tenancy agreements made between them and the respondents. At the end of the hearing the interim injunction was discharged. The appellants appealed.

Held, dismissing the appeal: (1) an injunction to restrain the respondents in the present case from committing a breach of clause 3.20 has the same effect as ordering them to continue running their businesses to provide and pay a staff and to see that their employees perform their duties;

(2) it is also well established that the court will not order specific performance of an obligation to carry on a business or any comparable series of activities;

(3) irreparable damage would be suffered by the respondents if the injunction were continued;

(4) the appellants had failed to pass the tests in the guidelines provided by Lord Diplock in the *American Cyanamid* case.

[*Editorial Note:* This judgment is the first authority in Singapore on the issue as to whether a landlord can enforce a positive covenant which entails the running of a business by way of an injunction.]

Cases referred to:

(1) *American Cyanamid* v. *Ethicon* [1975] A.C. 396.
(2) *London, Chatham, and Dover Railway Company and South-Eastern and Chatham Railway Companies' Managing Committee* v. *Spiers and Pond (Ltd.)* (1916) 32 T.L.R. 493.
(3) *Catt* v. *Tourle* L.R. 4 Ch. App. 654.
(4) *Kirchner & Co.* v. *Gruban* [1909] 1 Ch. 413.
(5) *Hooper* v. *Brodrick* 11 Sim 47; 59 E.R. 791.
(6) *Dowty Boulton Paul Ltd.* v. *Wolverhampton Corporation* [1971] 1 W.L.R. 204.
(7) *Johnson* v. *Shrewsbury and Birmingham Railway Co.* (1853) 3 De G.M. & G. 914; 43 E.R. 358.

MOTION.

Goh Hean Ngee (*Rick Wong* with him) for the plaintiffs.

P. Palakrishnan (*Sukhwant Singh* with him) for the defendants Nos. 65, 78, 79, 91, 93 and 151.

Mirza M. Namazie for the defendants Nos. 15, 52, 56, 66, 69, 110, 116, 131, 134, 135, 142, 143, 148 and 157.

Low Siew Joon for the defendants Nos. 2, 5, 6, 8, 9, 10, 11, 13, 16, 17, 18, 20, 21, 22, 24, 26, 27, 28, 29, 30, 31, 33, 37, 38, 39, 40, 42, 44, 45, 46, 50, 51, 53, 55, 61, 63, 64, 67, 68, 70, 73, 74, 76, 80, 82, 97, 98, 105, 109, 111, 112, 114, 115, 117, 119, 122, 126, 127, 128, 129, 138, 139, 141, 145, 146, 149, 150 and 155.

Cur. Adv. Vult.

Abdul Wahab Ghows J.: By agreements in writing made on various dates between the appellants and each of the respondents, the appellants leased to the respondents various portions of the premises in the building known as Parkway Parade. By clause 3.20 of the said agreements, the respondents agreed, *inter alia*, to keep their respective premises open for business from 10 a.m. to 10 p.m. daily or during such hours as the appellants shall from time to time prescribe as the usual business hours of the building. In breach of the aforesaid clause, the respondents on or about March 14, 1985 closed their respective premises and in consequence of which the appellants claimed that they had suffered loss and damage.

According to the appellants, the respondents threaten and intend to repeat the said breach unless they are restrained from so doing and the appellants seek an injunction to restrain the respondents from doing any act which, directly or indirectly, will cause a breach of clause 3.20 of the various tenancy agreements made between the appellants and the respondents until the expiration or termination of the various tenancy agreements made between the parties.

On the *ex parte* application of the appellants the court granted an interim injunction on April 25, 1985 restraining the respondents from causing a breach of clause 3.20 of the various tenancy agreements made between them and the appellants, which clause provides that the respondents shall keep their premises open for business from 10 a.m. to 10 p.m. daily, until after the hearing of this Motion or until further order.

The appellants appeared before me on May 21, 1985 and applied by way of a notice of motion for the interim injunction granted on April 25, 1985 to be continued till the trial of suit No. 3900/85 or till the expiration or termination of the various tenancy agreements made between them and the respondents. At the end of the hearing I ordered the discharge of the interim injunction made on April 25, 1985 and costs against the appellants to be taxed. This is an appeal against the whole of my aforesaid decision.

The respondents who are the appellants' tenants have been asking since late 1984 for a re-

duction in the rents payable to the appellants, alleging that the poor economic climate had adversely affected their businesses. On March 13, 1985 the respondents publicly announced their intention to close their shops for one day in an attempt to compel the appellants to reduce their rents. They carried out their threat on the following day. On March 23, 1985 the respondents wrote to the appellants intimating that they had decided to suspend payment of rent till a solution could be found. On April 16, 1985 the appellants announced a multi-million dollar package of concessions made entirely on an *ex gratia* basis which would cost the appellants about $7 million. According to the appellants, it would alleviate the cash flow problems of the respondents. The respondents rejected part of the appellants' package and threatened to close shop from April 29, 1985 for more than a day unless a satisfactory reply was obtained. The respondents wanted the rents reduced even more than as proposed in the package. In reply to this threat of a shut-down, the appellants applied for and obtained the interim injunction herein.

According to the appellants' counsel, the principles laid down in the *American Cyanamid* case[1] are applicable to their case. He alleged that damages would not provide an adequate remedy for the appellants in the event of their succeeding at the trial. He added that the previous shut-down had given the appellants' shopping centre an unsavoury reputation as a trouble spot thereby acting as a disincentive for prospective tenants and affecting the re-letting value of the centre. The appellants' bankers and financiers had also expressed concern about the viability of the centre as a whole. By reason of the aforesaid, the reputation, goodwill and commercial prospects of the centre had been adversely affected for which pecuniary damages would not be an adequate remedy.

It is not in dispute that the aforesaid tenancy agreements do not provide any means by which the tenants can legally terminate their tenancies.

The question in issue in the present case is whether or not the appellants have any real prospect of succeeding at the trial in their claim for a permanent injunction which requires the respondents to keep their respective premises open for business from 10 a.m. to 10 p.m. daily or during such hours as the appellants shall from time to time prescribe as the usual business hours of the building until the expiration or termination of the various tenancy agreements made between them and the respondents.

The respondents cited several authorities which laid down the principle that the court would not grant relief by way of an injunction, the effect of which would force the respondents to carry on business, to provide and pay their staff and to see that the members of it perform their duties. In *London, Chatham, and Dover Railway Company and South-Eastern and Chatham Railway Companies' Managing Committee* v. *Spiers and Pond (Limited),*[2] the defendants were the lessees of a hotel and restaurant from the plaintiffs, and had covenanted to use the premises as a hotel and restaurant during the term. Owing to loss of business during the war the defendants proposed to close the hotel for the time being, but to continue the restaurant. On an application by the plaintiffs for an interim injunction to restrain the defendants from closing the hotel the court held that as the effect of the injunction would be to order the defendants to carry on the business of the hotel and as it was not the practice to grant such an injunction the application must be refused.

It was firmly established by the authorities such as *Catt* v. *Tourle*[3] and *Kirchner and Co.* v. *Gruban,*[4] that the court must look at the substance of the covenant, and here, both in form and substance, the covenants were positive and not negative. And in *Hooper* v. *Brodrick*[5] it was held that the court had no jurisdiction to restrain a person from discontinuing to use premises as an inn, as that was the same in effect as ordering him to keep an inn.

Similarly, an injunction to restrain the respondents in the present case from committing a breach of clause 3.20 has the same effect as ordering them to continue running their businesses, to provide and pay a staff and to see that their employees performed their duties. According to counsel for the respondents their clients were running at a loss owing to the present depressed conditions and if they had to continue paying the rents demanded by the appellants they would soon be forced into bankruptcy or liquidation on account of insolvency.

It is also well established that the court will not order specific performance of an obligation to carry on a business or any comparable series of activities – see *Dowty Boulton Paul Ltd.* v. *Wolverthampton Corporation.*[6]

Just in case I was wrong in my view that the appellants did not have a real prospect of winning their suit, I considered the second principle laid down by Lord Diplock in the *American Cyanamid* case *(supra) i.e.,* whether damages in the measure recoverable at common law would be an adequate remedy. This is in effect a restatement of the established rule that a plaintiff should not be granted an interlocutory injunction unless he is able to show that if it were not granted he would suffer irreparable damage – see *Johnson* v. *Shrewsbury and Birmingham Railway Co.*[7] According to the appellants' general manager, Michael Leong Choon Fai, the appellants would suffer considerable hardship if the injunction were not continued and the respondents implemented another shutdown which would adversely affect the reputation, goodwill and commercial prospects of the centre for which pecuniary damages would not be an adequate remedy. The appellants have not pleaded that they will suffer irreparable damage if the injunction were not continued. On the other hand, counsel for the respondents claimed that their clients would be driven into bankruptcy or liquidation on account of insolvency if they were forced to continue operating their business in view of the high rents which they have to pay and also because of the current recession.

In the above premises, I found that irreparable damage would be suffered by the respondents if the injunction were continued. The appellants would be adequately compensated by the damages recoverable at common law and I was satisfied that the respondents would be in a financial position to meet such damages. In any event the appellants are not claiming damages in Suit No. 3900/85 against the respondents.

As the appellants had failed to pass the tests in the guidelines provided by Lord Diplock in the *American Cyanamid* case I dissolved the interim injunction granted on April 25, 1985 and ordered costs against the appellants to be taxed.

Appeal dismissed.

Solicitors: *Francis Khoo & Lim; Selvadurai Pala Krishnan & Partners; Mallal & Namazie; Low & Yap.*

PANACHAND & CO. (PTE.) LTD. v. RIKO INTERNATIONAL PTE. LTD.

[D.C.A. (Thean J.) August 30, 1985]

[Singapore – District Court Appeal No. 12 of 1985]

Contract – Novation – Goods sold and delivered – Mistake in invoice – Mistake accepted by both parties – Whether novation – Whether respondent entitled to set-off from purchase price – Set-off – Burden of proof.

On or about January 13, 1981, the defendants/respondents sold to the plaintiffs/appellants 543 bags of Cummin seeds for $75,051.60. The plaintiffs claimed to have negotiated from the defendants a 10% discount of the purchase price. Accordingly, the plaintiffs paid the defendants $67,545.90, less $7,505.70, representing the discount. The defendants appeared to have accepted the payment.

On January 30, 1982, Exim Agencies Pte. Ltd. ("Exim"), an associate company of the plaintiffs, agreed to sell to the defendants 188 bags of Turkish gallnuts for $53,942.40. The invoice was by mistake made out in the name of the plaintiffs as the vendor. The defendants did not consider a rectification necessary and accordingly paid the plaintiffs $46,438.70. They refused to pay the balance of $7,505.70, contending that it was a set-off from the plaintiffs' debt to them in an equivalent amount as the balance of the purchase price for the Cummin seeds sold to the plaintiffs in January 1981.

The learned District Judge dismissed the plaintiffs' claim for this amount as he held that the contract was made between Exim and the defendants and the plaintiffs were not "a party privy to this contract", and there was no evidence of any novation of the contract. The plaintiffs appealed.

Held: (1) parties are bound by their pleadings and by the agreement or admissions made in Court; the Court cannot decide on issues not raised in the pleadings;

(2) plainly the parties, namely, Exim, the plaintiffs and the defendants, must be taken to have agreed that the contract was to be treated as having been made between the plaintiffs and the defendants. There was a novation of the contract and the parties intended that the contract was between the plaintiffs and the defendants;

(3) on the basis of the pleadings and the agreement reached between the parties in Court, the burden of establishing the set-off rested squarely with defendants. The defendants had failed to discharge the burden.

Case referred to:

(1) *Kiaw Aik Hang Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99.

DISTRICT COURT APPEAL.

Bryan Manaf Ghows for the plaintiffs/appellants.

Bala Chandran s/o Kandiah for the defendants/respondents.